ORIGINAL

NO. 87-519

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY MAYNARD, et al.,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Willian Thomas Cartwright, moves for leave to proceed in this Court in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Respondent is incarcerated in the Oklahoma State Pententiary and is without funds with which to pay the costs of this proceeding. He sought and was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Oklahoma and in the United States Court of Appeals for the Tenth Circuit.

The undersigned attorney was appointed as counsel for respondent by the Court of Appeals under the Criminal Justice Act of 1964, as amended, and, pursuant to Rule 46 of the Rules of this Court, an affidavit in support of this motion is not required.

WILLIAM THOMAS CARTWRIGHT

BY Mandy Welch

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Mandy Welch, a member of the Bar of this Court, hereby certify that on November 22, 1987, a copy of the foregoing was mailed by first-class, postage prepaid mail, to:

David Lee
Assistant Attorney General
112 Capitol Building
Oklahoma City, Oklahoma 73105

Mandy Welch
MANDY WELCH

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GARY D. MAYNARD AND THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This brief is submitted by respondent Cartwright in opposition to the petition for a writ of certiorari filed by petitioner State of Oklahoma.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Did the Oklahoma Court of Criminal Appeals violate the Eighth and Fourteenth Amendments by upholding a death sentence based upon the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," where neither the jury instructions nor the Court of Criminal Appeals defined or applied that aggravating circumstance in such a manner as to avoid the arbitrariness condemned in Godfrey v. Georgia, 446 U.S. 420 (1980)?

(2) Can respondent's death sentence stand under the Eighth and Fourteenth Amendments where one of the two statutory

aggravating circumstances found by the jury is constitutionally invalid and the sentence was imposed pursuant to a statute that required the jurors to balance the aggravating and mitigating circumstances?

COUNTER-STATEMENT OF THE CASE

Respondent Cartwright was employed by Hugh and Charma Riddle in their construction business in 1981 and 1982. T 381-82. Mr. Cartwright injured his leg on the job. T 409. He was fired after he and Mr. Riddle had a disagreement over the payment of medical bills for treatment of his work-related injury. T 477-78.

Several months after being fired, Mr. Cartwright went to the Riddles' home to discuss a settlement of his claim for medical benefits. T 482. Ms. Riddle unexpectedly discovered Mr. Cartwright in the hall with a shotgun belonging to her husband. According to her testimony, she grabbed the gun, "pushed it aside and it went off." T 391, 411. She fell and Mr. Cartwright shot her again. T 412. Mr. Cartwright then went into the living room and shot Mr. Riddle. T 392. He died instantly. Thereafter, Mr. Cartwright and Ms. Riddle struggled and he stabbed her with a knife.[1] T 394.

Mr. Cartwright voluntarily turned himself in to the authorities two days after the crime. T 220. At that time, he was emotionally distraught, shaking, and had difficulty talking. T 223, 224, 440. The evidence at trial indicated that he suffered a loss of memory regarding many of the events preceding and following the offense. T 487-90.

The shooting of Mr. and Ms. Riddle was strikingly inconsistent with Mr. Cartwright's previous history. He had no prior criminal record of any sort. T 468-71. Further, he had no history of violent or assaultive behavior. According to the testimony of relatives and previous employers, Mr. Cartwright had always been a good and dependable employee, had not shown any

[1] Mr. Cartwright received a 75-year sentence for the attack on Ms. Riddle.

tendency toward violence, and had usually avoided disputes. T 430-67. He had been a good friend and valued employee of the Riddles. T 405, 475, 478. However, when Mr. Riddle fired him over a disputed medical bill, he felt betrayed and apparently suffered considerable emotional distress.

Prior to trial, the prosecutor filed a Bill of Particulars alleging three aggravating circumstances under the Oklahoma capital sentencing statute. Okla. Stat. Ann. tit. 21 §§ 701.12 (2), (4), (7) (West 1983): (1) Mr. Cartwright created a great risk of danger to more than one person; (2) the murder was "especially heinous, atrocious, or cruel"; and (3) there was a probability that Cartwright would commit future crimes of violence that would constitute a threat to society. The jury, finding the first and second aggravating circumstances but not the third, returned a death sentence.[2]

The Oklahoma Court of Criminal Appeals -- which once ruled in another case that the "especially heinous" circumstance must be applied according to the narrowing instruction approved in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976)[3] but which thereafter abandoned such a requirement[4] -- applied no narrowing

[2] The instructions which directed the jury's consideration of the "especially heinous" circumstance were the following:

> As used in these Instructions, the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

T 620.

[3] In Proffitt, the Court held that by limiting the application of the heinous, atrocious, or cruel circumstance to "'the conscienceless of pitiless crime which is unnecessarily torturous to the victim,'" the state provided adequate guidance to the sentencer. 428 U.S. at 255-56 (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)). The Oklahoma court appeared to adopt this limitation in Eddings v. State, 616 P.2d 1159, 1167-68 (Okla. Crim. App. 1980), rev'd on other grounds sub nom., Eddings v. Oklahoma 455 U.S. 104 (1982).

[4] See, e.g., Irvin v. State, 617 P.2d 588, 598-99 (Okla. Crim. App. 1980)(not mandatory to include the "unnecessarily torturous to the victim" language in instructions to jury); Nuckols v. State, 690 P.2d 463, 471-73 (Okla. Crim. App. 1984)("suffering of the victim is not the major factor we consider regarding this aggravating circumstance").

definition in Mr. Cartwright's case. Rather, it found the "especially heinous" circumstance had been established "in light of the circumstances attendant to the murder," without specifying any criterion, factor, or aspect of the "circumstances" that explained or limited the application of this aggravating circumstance. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App.), cert. denied, 473 U.S. 911 (1985)(App. E. at 23-25). The Tenth Circuit, in a unanimous en banc opinion, granted the writ as to Mr. Cartwright's sentence of death. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)(App. A). It held that the "especially heinous" standard had been applied in a vague and overbroad manner in violation of Godfrey v. Georgia, 446 U.S. 420 (1980), and that Mr. Cartwright's death sentence could not stand where one of two aggravating circumstances found by his sentencing jury was constitutionally invalid, since "[a]n aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer...." 822 F.2d at 1482.

REASONS FOR DENYING THE STATE'S PETITION FOR WRIT OF CERTIORARI

There is no issue worthy of certicrari presented by this case. The Tenth Circuit's unanimous en banc opinion is clearly correct. It faithfully follows the fundamental constitutional principles established by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980), Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983). Contrary to petitioner's main argument, there is no conflict among the circuits.

I

THE GODFREY ISSUE

In Furman v. Georgia, 408 U.S. 238 (1972), this Court required "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S.

153, 189 (1976). Following Furman, Oklahoma and other states adopted death penalty statutes setting forth various aggravating circumstances to be considered by the sentencer. In Gregg v. Georgia, supra, the Court held that a facially vague aggravating circumstance was not necessarily unconstitutional because the state courts could adopt narrowing constructions sufficient to focus the jury's attention on objective criteria that would avoid arbitrary and capricious results. See also Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

In Godfrey v. Georgia, supra, the Court considered whether Georgia had adopted a constitutionally narrowing construction of its statutory "vileness" aggravating circumstance (i.e., whether a murder is "outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim"). Godfrey, following a prolonged and heated marital dispute, shot his wife and mother-in-law and assaulted his young daughter. The wife and mother-in-law each died instantly. In reversing Godfrey's death sentence, the Court pointed out that the Georgia Supreme Court had upheld it under the vague and subjective "vileness" standard without requiring, as previous cases had done, evidence of objective facts of "'torture, depravity of mind, or an aggravated battery to the victim.'" 446 U.S. at 430-31. Thus, Georgia had failed to provide a "principled way to distinguish [a] case, in which the death penalty [is] imposed, from the many in which it is not." 446 U.S. at 433.

The Tenth Circuit correctly recognized that Godfrey controls this case. The two case are factually indistinguishable in all material respects. Here, as in Godfrey, the victim died instantly from a gunshot wound.[5] Here, as in Godfrey, Oklahoma

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[5] Indeed the sequence of events was not materially different in either case, except that Godfrey killed two persons and Mr. Cartwright killed one. Godfrey shot and killed one victim with a shotgun, by shooting her through the window of her trailer. He then entered the trailer and struck and injured his daughter with the barrel of the shotgun. Thereafter, he pointed the gun at the second homicide victim and shot her in the forehead, killing her instantly.

had once interpreted its "especially heinous" factor as requiring evidence of physical abuse or torture -- an objective standard approved by this Court in Proffitt v. Florida, supra. But here, as in Godfrey, the Oklahoma court abandoned any narrowing construction of the vague statutory phrase and sanctioned the death sentence based on a subjective and open-ended consideration that gave the sentencer unbridled discretion to find the "especially heinous" circumstance on the basis of all the facts in the case. As the Tenth Circuit explained in Mr. Cartwright's case,

> The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

822 F.2d at 1491.[6]

As the Tenth Circuit's opinion makes manifest, Cartwright is thus a straightforward application of Godfrey to a case arising under Oklahoma's capital sentencing statute. The Tenth Circuit's statement of the Godfrey requirements neither extends nor reframes nor even significantly elucidates the holding or the plain implications of Godfrey. There simply is no constitutional point or principle for which Cartwright could be cited that is not already fully controlled by Godfrey.

Cartwright does, of course, add an analysis of Oklahoma law. But Oklahoma law is a matter of no national consequence. Neither Oklahoma law nor the application of an unembroidered federal constitutional principle to a peculiar body of Oklahoma caselaw is an appropriate subject for this Court's certiorari jurisdiction. Indeed, the Court has long made it a practice to defer to the judges of the federal circuit courts in their reading of state law, since they are closer to it and more

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[6] As a leading commentator has noted, "The Oklahoma Court of Criminal Appeals' view of its state's 'especially heinous, atrocious, or cruel' aggravating circumstance has proven to be remarkably inclusive.... [I]t has used whatever it finds distasteful about a murder to affirm an especially heinous finding." Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941, 986 (1986).

familiar with the landscape of state court decisions than this Court can possibly be.

Even as to state law, however, the Tenth Circuit has not purported to write the last word. Rather, it has carefully adhered to the limits of constitutional intrusion permitted--indeed required -- by Godfrey. To dress the case up as worthy of this Court's plenary review, the State is forced to distort the Tenth Circuit's holdings in this respect. For example, the State says that "[t]he opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance 'especially heinous, atrocious, or cruel' must be limited to those cases where the victim suffered from physical abuse, and factors such as the attitude of the killer cannot be considered...." Petition, at 24. The Tenth Circuit does not say, and its opinion cannot "be read to imply" anything of the sort. What it says--as it must under Godfrey, Gregg, and Proffitt -- is that the Oklahoma Court of Criminal Appeals is obliged to give some sort of limiting construction to the "especially heinous" aggravating circumstance, and that the limiting construction adopted by the court must be adhered to in its review of sentencers' findings of the "especially heinous" circumstance. Further, the Tenth Circuit says -- as Godfrey squarely holds -- that if a state court decides to confine the "especially heinous" circumstance to cases involving torture or physical abuse, as it could properly do under Proffitt, it cannot turn this limiting principle on and off at random and approve a finding of the especially heinous circumstance where physical abuse is lacking.

Compounding this distortion, the State says that the Tenth Circuit held that "because the Oklahoma Court of Criminal Appeals, in reviewing cases in which [the especially heinous circumstance] ... ha[s] been found, has held that either the attitude of the killer, the manner of the killing, or the suffering of the victim can be used to uphold a jury finding..., the Oklahoma court ha[s] not interpreted the aggravating circumstance in a way that genuinely narrow[s] the class of

persons subject to the death penalty." Petition, at 22-23. Again, the Tenth Circuit held nothing of this sort. To the contrary, what the Tenth Circuit did was to explore each of these dimensions -- the killer's attitude, the manner of the killing, and the victim's suffering -- as the Court of Criminal Appeals has developed each, to see if any of the dimensions imposed any genuine restriction upon the classification of murders as heinous, atrocious or cruel. Only after finding that none of these dimensions imposed any such restriction did the Tenth Circuit hold that the Oklahoma court had failed to adhere to Godfrey, according to Godfrey's plain terms. 822 F.2d at 1489-91.[7]

Thus, contrary to the State's depiction of the Tenth Circuit's opinion, the Tenth Circuit in no respect mandated that Oklahoma adopt any particular limiting principle in applying the "especially heinous" aggravating circumstance. It determined only that Oklahoma had neither adopted nor adhered to such a principle. And in making this determination, the Tenth Circuit left open to the Oklahoma Court of Criminal Appeals the option of avoiding any future Godfrey problems by reinstating the "unnecessarily torturous" limiting principle which it originally adopted but then abandoned, or by adopting any other clarifying interpretation of the "especially heinous, atrocious, or cruel" language that the Court of Criminal Appeal might choose, within

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[7] The court did note that Oklahoma's definition of "cruel" (see n. 2, supra), in focusing on the suffering of the victim and the defendant's attitude toward it, "is somewhat more precise...." 822 F.2d at 1489. There were, however, two reasons that this definition failed to cure the Godfrey problem:

> First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance.... Second, because the Oklahoma court has emphasized that a murder need only be heinous, atrocious, or cruel,... even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance.

Id. at 1489-90 (citations omitted)(emphasis in original).

the wide latitude left by Godfrey and undiminished by the Cartwright opinion itself.

The State's final attempt to make its petition seem worthy of plenary review is its manufacture of conflicts between the Tenth Circuit in Cartwright and other circuits. The State asserts that other federal circuits have upheld the application of other states' "especially heinous" provisions to cases factually similar to Mr. Cartwright's, see, e.g., Petition, at 23-24, 25-26, and that the Fourth Circuit's decision in Turner v. Murray[8] is inconsistent with Cartwright because Turner distinguished Godfrey on grounds that imply that the Fourth Circuit "reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was identical to the review conducted by the Oklahoma Court of Criminal Appeals in this case," Petition, at 26-27. All of this is vastly wide of the mark, inasmuch as the Tenth Circuit never purported to decide whether Mr. Cartwright's particular offense could or could not have been characterized as especially heinous, atrocious, or cruel on the facts, had the Oklahoma Court of Criminal Appeals chosen to adopt a limiting principle against which to measure those facts.[9] Nor did the Tenth Circuit hold

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[8] Turner v. Bass, 753 F.2d 342, 351-53 (4th Cir. 1985), rev'd on other grounds sub nom., Turner v. Murray, 90 L.Ed.2d 27 (1986).

[9] Indeed in all the cases cited by the State as factually similar cases, the states involved had adopted and adhered to a variant of the "unnecessarily torturous" limiting principle. See Turner v. Bass, 753 F.2d at 351-53 (applicable where aggravated battery of the victim preceded the killing); Evans v. Thigpen, 631 F.Supp. 274, 284 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 241 (5th Cir. 1987) (applicable only to "'conscienceless or pitiless crime which is unnecessarily torturous to the victim'"); Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984) (applicable only to cases involving physical or psychological torture); Booker v. Wainwright, 764 F.2d 1371, 1380 (11th Cir. 1985)(same); White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987)(same). Whether the finding of heinous, atrocious, or cruel in Mr. Cartwright's case would have been sustained in these states is irrelevant, for Godfrey's rule cannot be satisfied simply because there is some other state in which the finding would have been sustained under a properly limited application of the circumstance. Instead, Godfrey entitles the condemned person to have the finding of his aggravating circumstances measured against limiting principles that have been adopted and applied with reasonable consistency by the courts in which he has been sentenced and in which his sentence is reviewed.

that there would be anything wrong with the Oklahoma Court of Criminal Appeals' considering a killer's attitude as relevant to the "especially heinous" circumstance, so long as the consideration of this factor complied with Godfrey in defining a particular attitude that would establish the "especially heinous" circumstance and adhering to that definition. What the Tenth Circuit did hold was the following:

> We make no judgment as to whether the attack in this case was 'especially heinous, atrocious, or cruel.' We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

822 F.2d at 1492.

II

THE STEPHENS ISSUE

In determining the effect of the sentencer's reliance in Mr. Cartwright's case on a constitutionally invalid aggravating circumstance, the Tenth Circuit again conducted a straightforward analysis, on the basis of the principles articulated by this Court in Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983). Even the State does not fault this analysis.[10] Instead, the State directs its entire effort toward manufacturing a non-existent conflict between the Tenth Circuit and the Fifth Circuit on this question. The State's fabrication is based upon a misunderstanding of Stephens and Barclay and their differing analyses with respect to "non-balancing," Georgia-type death penalty statutes and "balancing," Florida-type death penalty statutes. The Tenth Circuit, however, plainly understood these differing analyses.

Whether a death sentence must be vacated if one of two or more statutory aggravating circumstances found by the jury is subsequently held to be unconstitutional "depends on the function of the jury's finding of an aggravating circumstance under [the state's] capital sentencing statute...." Stephens, 462 U.S. at

[10] Indeed the State did not argue before the Tenth Circuit, nor has it argued here, that the sentencer's improper consideration of the "especially heinous" circumstance had no effect on Mr. Cartwright's sentence.

864. In examining the Georgia statute in Stephens and the Florida statute in Barclay, this Court identified significant differences between "the function of the jury's finding of an aggravating circumstance" under the Georgia and Florida statutes.

In Stephens, the Court found that the sole function of the jury's finding of an aggravating circumstance in Georgia is to narrow the class of persons eligible for the death penalty. 462 U.S. at 875. Upon the jury's finding of one statutory aggravating circumstance, the defendant becomes death-eligible. Once the defendant is death-eligible, the jury may in its discretion impose the death penalty after considering all the facts and circumstances of the case.

> [T]he jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.

Id. at 873-74. For these reasons, so long as one valid statutory aggravating circumstance is found, as in Stephens, the function of finding an aggravating circumstance in Georgia -- narrowing the class of death-eligible defendants -- has been fulfilled. Id. at 879. If one or more of the other aggravating circumstances is improperly found, that error is harmless. Id. at 886-89.

In contrast to Georgia's statutory scheme, the function of the finding of an aggravating circumstance in Florida is not simply to narrow the death-eligible class, but, rather, to guide the discretion of the sentencer. When an aggravating circumstance is found in Florida, it must be weighed against the mitigating circumstances. If it outweighs the mitigating circumstances, death can be imposed. Although "the sentencing authority is not required to impose the death penalty" at this point, Barclay 463 U.S. at 963 (Stevens, J., joined by Powell, J., concurring), the sentencer's discretion "is more

circumscribed" at this point than at the corresponding point in Georgia's capital sentencing process. Id.

When aggravating circumstances are found in Florida, they play a crucial role in guiding the sentencer's ultimate exercise of sentencing discretion. Unlike Georgia, where "the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard," Stephens, 462 U.S. at 873-74, Florida does instruct the jury in this fashion. In the Florida scheme, therefore, the erroneous weighing of an aggravating circumstance necessarily affects the sentencer's choice of life or death, for the weight of aggravating circumstances -- which is a critical guidepost for that choice -- is improperly increased by that error.

The Tenth Circuit correctly found that Oklahoma's statutory scheme is like Florida's:

> The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in Zant.... Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla. Stat. Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat. Ann. tit. 21, § 701.11 (West 1983).

822 F.2d at 1480. Thus, Oklahoma, like Florida, "uses an aggravating circumstance to guide the discretion of the sentencer rather than to define which first degree murders are capital offenses." Id.[11]

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[11] The importance of the aggravating circumstances in guiding sentencing discretion in Oklahoma was further emphasized by the Tenth Circuit in Parks v. Brown, 823 F.2d 1405, 1415 (10th Cir. 1987), where the court read Oklahoma law as requiring the imposition of death if aggravating circumstances outweigh mitigating circumstances. Whether that reading of Oklahoma law is accurate is not a question raised in this proceeding; nevertheless, that Oklahoma law could reasonably be understood in this way simply emphasizes how important aggravating circumstances are in guiding the Oklahoma sentencer's discretion.

Stephens and Barclay also establish that the effect of a capital sentencer's reliance on an invalid aggravating circumstance depends "on the reasons that the aggravating circumstance at issue... [is] found to be invalid." Stephens, 462 U.S. at 864. Here, there is a critical distinction between errors of state law and errors of constitutional law. If the aggravating circumstance is invalid because it is federally unconstitutional, a "federal harmless-error analysis" must be applied, to determine whether the sentencer's consideration of the invalid circumstance was harmless beyond a reasonable doubt. Barclay v. Florida, 463 U.S. at 951 n.8 (referring to Zant v. Stephens, 462 U.S. at 884-89). If, on the other hand, the aggravating circumstance is invalid solely under state law, no such analysis is necessary, because "a 'mere error of state law' is not a denial of due process." Id.

In undertaking this part of the Stephens analysis in Mr. Cartwright's case, the Tenth Circuit was fully aware of the distinction to be made between state-law error and federal constitutional error. 822 F.2d at 1481-83. Categorizing the basis for invalidity of the "especially heinous" aggravating circumstance in Mr. Cartwright's case, the Tenth Circuit found that the circumstance was invalid because it failed to comport with the Eighth Amendment's requirement of meaningful channeling of capital sentencing discretion. Id. at 1482. Because the circumstance was invalidated on this ground, the Tenth Circuit correctly recognized that the burden then fell upon the State to show that the erroneous consideration of the circumstance was harmless beyond a reasonable doubt. Id. at 1482-83.

It was at this point that the Tenth Circuit concluded that the State could not make such a showing in Mr. Cartwright's case, because of "the function of the finding of an aggravating circumstance" in Oklahoma, Stephens, 462 U.S. at 864.[12] As the

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[12] As we have already noted, the State did not even attempt to demonstrate that the erroneous consideration of the "especially heinous" circumstance was harmless in Mr. Cartwright's case.

court explained, "An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant." Cartwright, 822 F.2d at 1482. Further, the Oklahoma courts have deemed that role so critical that they "have declined to reconsider... [the decision to impose death] on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process." Id. Since the state appellate court does not consider that such an error can ever be harmless, it is plain that "[i]n such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer," and cannot, therefore, be shown to be harmless beyond a reasonable doubt. Id. at 1482-83 (emphasis supplied).[13] The Tenth Circuit was thus clearly correct in holding that the death sentence could not stand in this case.

The State does not contend that the Tenth Circuit's unanimous en banc opinion is contrary to this Court's opinions or constitutes a misstatement of Oklahoma law on the balancing issue. Rather, it attempts to create the appearance of a circuit conflict by misreading certain Fifth Circuit opinions.

The State devotes most of its second point, see Petition, at 38-49, to a claim that the Tenth Circuit's en banc opinion conflicts with Fifth Circuit decisions upholding death sentences under Louisiana law where one of several aggravating factors was invalid. The State argues that the Fifth Circuit reached this result even though in Louisiana "the jury weighs the aggravating circumstances against mitigating circumstances when determining whether to impose the death sentence." Petition, at 41-42.

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[13] This, of course, assumes that there are, in any particular case, mitigating circumstances against which aggravating circumstances are balanced, for only if there is a balancing between aggravation and mitigation is there a "balance struck by the sentencer" which is necessarily affected by the consideration of a constitutionally invalid aggravating circumstance. In Mr. Cartwright's case there were, indisputably, substantial mitigating circumstances.

But the very premise of the Fifth Circuit's decisions is that, as it reads Louisiana law, the Louisiana statute is not a balancing statute, as are the statutes of Florida and Oklahoma. According to the Fifth Circuit, Louisiana, like Georgia, merely uses an aggravating circumstance to determine the class of defendants who are eligible for capital punishment: a finding of one aggravating circumstance is adequate. In determining who among the eligible class are to be sentenced to death or life imprisonment, the Fifth Circuit has found that "Louisiana law does not require weighing of aggravating against mitigating circumstances."[14] In contrast, Oklahoma makes all first-degree murderers eligible for the death sentence, and the statute specifically requires a weighing of aggravating and mitigating factors to decide which defendants should be sentenced to death or life imprisonment.

This critical difference between the function of the sentencer's finding of an aggravating circumstance in Oklahoma and Louisiana was pointed out here by the Tenth Circuit. Cartwright, 822 F.2d at 1480. The Tenth Circuit found that "the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty." Id. at 1480. Oklahoma "uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular purpose." Id. at 1480.

It is this factor which distinguishes the differing decisions in the Fifth Circuit and the Tenth Circuit. There is no conflict to be resolved. A difference between state statutory schemes, rather than a difference in federal analytical

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[14] Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987). See also Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986), cited in Cartwright, 822 F.2d at 1480. Petitioner's strenuous efforts, see Petition, at 42-48, to impeach Wilson as incorrect and in conflict with other Fifth Circuit opinions is without merit. Moreover, assuming arguendo that the Fifth Circuit is wrong in its view of Louisiana law, the present certiorari petition is surely not the proper vehicle for dealing with that problem.

principles, accounts for the differing results in Cartwright and the Fifth Circuit cases cited by the State.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

November 22, 1987

Respectfully submitted,

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